STATE OF MICHIGAN

IN THE SUPREME COURT

Appeal from the Court of Appeals

Panel: Whitbeck, P.J., and Smolenski and Cooper, JJ.

PAUL DRESSEL and THERESA DRESSEL,

Plaintiffs-Appellees,

v

AMERIBANK,

Defendant-Appellant

_____/

Supreme Court Docket No. 119959

Court of Appeals Docket No. 222447

Kent County Circuit Court
No. 98-013017-CP

APPELLEE BRIEF OF

PAUL AND THERESA DRESSEL

DREW, COOPER & ANDING
By: John E. Anding (P30356)
Christopher G. Hastings (P40861)
Bridget C. Kehoe (P28196)
Attorneys for Plaintiffs-Appellees

125 Ottawa N.W.
Suite 300, Ledyard Building
Grand Rapids, Michigan 49503
(616) 454-8300

TABLE OF CONTENTS

INDEX OF AUTHORITIES

CASES

STATUTES

REGULATIONS

JURISDICTIONAL STATEMENT

The Dressels concur with the jurisdictional statement on p. v of Appellant's Brief.

STANDARD OF REVIEW

Review of legal issues is de novo. Jackhill Oil Co. v. Powell Production, Inc., 210 Mich App 114; 532 NW2d 866 (1995). The facts adduced by the available pleadings, affidavits, depositions and other evidence must be viewed in a light most favorable to Appellees Paul and Theresa Dressel, as they are the parties against whom summary disposition was rendered at the trial level. Unisys Corp. v. Commissioner of Insurance, 236 Mich App 686; 601 NW2d 155 (1999).

COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Does charging a fee for the preparation of loan documents (note and mortgage) by a nonlawyer bank employee cross the threshold between activities appropriate for a lender and those reserved to members of the bar?

Appellant answers "No."

Appellees answer "Yes."

The Court of Appeals answered "Yes."

2. Is Appellant AmeriBank "authorized by law" to charge a fee for the preparation of legal documents?

Appellant answers "Yes."

Appellees answer "No."

The Court of Appeals answers "No."

3. Are mortgage lenders who engage in the unauthorized practice of law by charging a fee for the preparation of legal documents subject to a remedy under the Consumer Protection Act?

Appellant answers "No."

Appellees answer "Yes."

The Court of Appeals answers "Yes."

SUMMARY OF ARGUMENT

Unauthorized Practice of Law

Michigan law has long held that the preparation of legal documents - - even standard form legal documents - - must be accomplished by either a licensed lawyer or by a lay party with an interest in the underlying transaction. A lay party may, however, not exact a fee of another for doing so without crossing the threshold into the unauthorized practice of law. In so holding, Michigan follows a rule widely followed by other states.

In the years leading up to this action, some (but by no means all) mortgage lenders began to encroach upon this rule by charging "Document preparation" fees. Ameribank, Appellant in this action, charged $400 for "Document preparation," disclosing it to the Dressels and others as a cost associated with "preparation of the final legal papers, such as a mortgage, deed of trust, note or deed."

Now that the Court of Appeals has followed this Court's precedent laid down in Ingham County Bar Ass'n. v. Walter Neller Co., 342 Mich 214; 69 NW2d 713 (1955) and State Bar of Michigan v. Kupris, 366 Mich 688; 116 NW2d 341 (1962), Ameribank and a host of industry *amici* ask this Court to retroactively **change** the law to conform to their practices. Reduced to its essence the mortgage industry asks this Court to put expedience before justice, to supplant *stare decisis* and established rules of statutory construction with judicial activism.

Consumer Protection Act

AmeriBank's precise position concerning the Consumer Protection Act remains a moving target. At trial, where it neither pleaded nor argued immunity to the Act, it claimed to be a State Savings Bank. After the Court of Appeals relied upon this admission in addressing AmeriBank's belated exemption argument, AmeriBank told this Court in its application that it was in fact a federally-chartered institution. AmeriBank's new brief finds AmeriBank once again conceding that it was a state-chartered institution at the time of the Dressel loan.

While Appellant's duplicity does little more than underscore the Dressel's position that the exemption issue is not properly before this Court, the issue is not complicated. If this Court affirms the Court of Appeals' central holding that charging a fee for the preparation of legal documents "crosses the threshold" between mortgage lending and the practice of law (Dressel v. AmeriBank, slip op p. 14, 247 Mich App 133, 144 (2001)), then the Court's holdings in Smith v. Globe Life Insurance Co., 460 Mich 446; 597 NW2d 28 (1999) and Attorney General v. Diamond Mortgage, 414 Mich 603; 327 NW2d 805 (1982) mandate affirmance of the Court of Appeals' result, as AmeriBank was outside the appropriate realm of mortgage lending and in the forbidden realm of the practice of law when it prepared legal documents for a fee. Neither opinion will countenance a lender doing the work of a lawyer and then claiming Consumer Protection Act exemption - - indeed this is the very principle from Diamond Mortgage relied upon by the majority in Globe Life. Moreover, the presence of subsections 3(o)

and 17 (MCL §445.903(o) and MCL §445.917) establish that the legislature intended the Consumer Protection Act to apply to lenders and specifically to banks.

COUNTERSTATEMENT OF FACTS

On November 7, 1997, Paul and Theresa Dressel closed a loan secured by their home in Newaygo, Michigan. At closing, they were provided with a "Settlement Statement" which explained the manner in which loan proceeds were disseminated. Among the fees paid was AmeriBank's $400 "Document preparation" fee. (See line 1105 of Settlement Statement, App 8a).[1]

What the "Document preparation" fee is for should not be a subject of dispute. According to a Housing and Urban Development ("HUD") pamphlet that AmeriBank provided to the Dressels and each and every mortgage borrower (Pankratz Dep., p. 57, lines 23-25, App 32b), "Document preparation" consists of the preparation of the "final legal papers, such as a mortgage, deed of trust, note or deed." (HUD Guide, descriptions of line 1105 and charges numbered "1100," App 10b).[2] Indeed, AmeriBank initially admitted in its Answer to the Complaint that its $400 "fee disclosed on the HUD-1 form is for preparation of documents used for closing and otherwise by AmeriBank." (Answer, ¶ 7, App 44b).

---

[1] Line 1105 reflects that $322 of the fee was financed with loan proceeds and $78 paid in cash ("paid outside of closing," or "POC").

[2] The language of the HUD Guide is mandated by Regulation X, 24 CFR Part 3500, Appx. A, which provides "Line 1105 is used for charges for preparation of deeds, mortgages, notes, etc." Furnishing a HUD-1 is required by federal law. 12 U.S.C. §2603.

It was not until discovery into AmeriBank's justification for its $400 "Document preparation" fee that AmeriBank attempted to recast the "Document preparation" fee as one not limited to covering the cost of preparing "final legal papers" but rather a fee to "cover the cost of *originating* the loan within the residential mortgage loan department."[3] In fact, the fee was originally called a "processing fee." (Pankratz Dep., p. 45, line 25 to p. 46, line 4, App 29b). Pankratz admitted that the "Document preparation" fee covered "activities . . . classically and traditionally referred to as part of loan processing." (Id., p. 65, lines 16-19, App 34b. See also p. 54, lines 13-20, App 31b). Because loan processing charges are, under the Truth in Lending Act, 15 USC 1605 (2), "finance charges," disclosing the fee as one for "Document preparation" on Line 1105 and failing to properly include it in the "finance charge" on the Truth in Lending Disclosure understated the cost of the credit to the borrower and thus was misleading and deceptive, as Plaintiffs pleaded in their Complaint. (Complaint, Exhibit 6, ¶¶ 1, 10, 16, 27(b)(ii), 27(c)(ii), 27(d)(ii), 27(e)(ii), 27(f)(ii-iii), 35(b-c) and 42(b-c) App 50b-64b).

The actual cost of preparing the mortgage and note is minimal. Pankratz admitted that the costs of preparing "final legal papers" was far less than $400. (Id. p.

[3] Such processing fees relate to a distinctly different activity as evidenced by their separate and distinct disclosure under federal law. See the Real Estate Settlement Procedures Act (RESPA), specifically 12 U.S.C. §2603 and Regulation X, 24 CFR Part 3500, Appx A (*origination fee* to be disclosed on Line 801 of HUD-1 form). RESPA further provides that lenders may charge no fee for preparing truth in lending disclosures, settlement statements (HUD-1's), or any other document required by RESPA or the Truth in Lending Act. 12 U.S.C. §2610.

62, lines 13-20, App 33b).[4]

Although its carefully-worded Brief to this Court might imply otherwise, AmeriBank has never disputed that it told borrowers that the "Document preparation" fee was solely for preparation of "final legal papers such as a mortgage, deed of trust, note or deed." (Compare Complaint ¶ 7, App 52b, to Answer ¶ 7, p. 57, App 44b).

Indeed, AmeriBank takes several unjustified liberties with the facts as it attempts to re-cast them for this Court. Contrary to the assertion at p. 5 of AmeriBank's Brief, the Pankratz affidavit does not state that "it cost AmeriBank an average of $1120 per residential mortgage loan to fill in all of the documents needed for the loan and its processing," rather it states that all loan charges, of which "Document preparation" is a subset, totaled $1120. (Pankratz Aff, App 24a). Should the Court care to compare AmeriBank's description of the Pankratz Affidavit (in particular that page referenced as "Appendix 24a") with the billing it receives on page 5 of AmeriBank's Brief, it will find other unsupported embellishments, for example, the suggestion that AmeriBank uses standard forms approved by the Federal National Mortgage Association ("FNMA"). No record supports this averment. Moreover, the Dressel Mortgage is not a uniform instrument. It contains several distinct paragraphs each identified as "non-uniform covenants" (App 13a), each of which proscribes the borrowers' rights to some extent. Indeed, one of the non-uniform covenants included in the Dressel mortgage limits the

[4] Although AmeriBank states time and again that the Pankratz affidavit is "uncontroverted," it is in fact controverted by Pankratz' own deposition and the record, on this critical point and others. By way of example, compare Pankratz Aff, ¶8 and 9 to Answer ¶7 and 8 (App 44b) and to Pankratz dep, p. 61, lines 20-23 (App 33b), p. 65, lines 16-19 (App 34b). Compare ¶11 [averring that Pankratz is unaware of what "final legal papers" means] with Pankratz dep., p. 60, lines 22-25, p. 96, lines 6-15 (App 32b, 41b).

Dressels' rights on default by providing that they cannot cure a default after 30 days except by paying off the entire mortgage. ¶21, App 13a.

COUNTERSTATEMENT OF MATERIAL PROCEEDINGS

The case was filed December 21, 1998, as a class action. On March 22, 1999, the court certified the case as a class action pursuant to MCR 3.501.

Cross-Motions for Summary Disposition were filed in March, and were fully briefed by April 14, 1999. Discovery was ongoing and discovery motions pending. On July 2, 1999, the Circuit Court, Honorable Dennis C. Kolenda, granted AmeriBank's Motion for Summary Disposition and dismissed the entire case, including the Michigan Consumer Protection Act claims.

Significantly, in neither its Answer and Affirmative Defenses (App 43b) nor its summary disposition brief (App 67b), did AmeriBank claim it was the beneficiary of an exemption from the Michigan Consumer Protection Act, MCL 445.901 *et seq.* Consequently, as AmeriBank correctly points out, the Dressels did not brief the issue of Consumer Protection Act exclusion to the Court of Appeals when it filed its Brief on Appeal, but AmeriBank's suggestion (at p. 23 of its Appeal Brief) that "Plaintiffs did not appeal the dismissal of the MCPA claim" (emphasis in AmeriBank's original) is flatly **untrue**. The Dressels timely appealed the dismissal of **all** the claims, including the Consumer Protection Act claim.

AmeriBank, however, on appeal devoted a scant page-and-a-quarter of its Appellee's Brief to the notion that it was a "Michigan savings bank," and as such was exempt from the Michigan Consumer Protection Act. (AmeriBank's Appellee's Brief,

App 117b-118b, pp. 24-25). Although the issue of MCPA exemption was not properly before the Court of Appeals, the Court considered (and rejected) it anyway.

Subsequently, when AmeriBank sought permission to file its appeal in this Court, it **denied** it was a "Michigan savings bank," claiming it was a federal savings bank. (AmeriBank Application for Leave to Appeal, pp. viii, 24-25).

Now, in yet another about-face, AmeriBank renews its claim to being a "Michigan savings bank," thus undermining the very argument it used to persuade this Court to grant leave to appeal.

ARGUMENT

I. UNAUTHORIZED PRACTICE OF LAW

A. THE CURRENT STATE OF MICHIGAN LAW

i. Filling in Blanks on Form Legal Documents for a Fee is the Practice of Law

The principal problem with AmeriBank's contention that completing form legal documents is not the practice of law under the circumstances at bar is that no Michigan law supports it. Grand Rapids Bar Association v. Denkema, 290 Mich 56; 287 NW 377 (1939) holds that preparing form real estate documents for a consideration constitutes the practice of law. Denkema 290 Mich at 66. Indeed, even the dissent in Denkema agreed with this proposition. Denkema, dissenting opinion at 70. Although AmeriBank cites State Bar of Michigan v. Cramer, 399 Mich 116; 249 NW2d 1 (1976), it neglects to report that Cramer limited a seller of "divorce kits" to providing blank forms together with generalized instructions for filling them out, and affirmed an injunction

forbidding the defendant from completing the forms. See Cramer at 124 (injunction) and 138 (affirmance of injunction).

AmeriBank suggests that Detroit Bar Ass'n v. Union Guardian Trust Co, 282 Mich 216; 276 NW 365 (1937) supports its position, quoting a long passage from Union Guardian that begins, "Within the limitations indicated . . ." AmeriBank Application, p. 6, Union Guardian 282 Mich at 229. What AmeriBank neglects to reveal is that one of the "limitations indicated" is that the drafter of nontestamentary trusts be a trust company such as Union Guardian, which was specifically authorized by law to draw such trusts, and to charge a fee for doing so. Union Guardian at 224-225, citing 3 Comp Laws 1929, §12018. No such law authorizes AmeriBank to prepare notes and mortgages and charge a fee for it.

AmeriBank employs this same technique in its selection of a quote from State Bar of Michigan v. Kupris in which this Court wrote:

> Is the filling out of blanks in standard forms used in property transactions the practice of law in the general acceptance of the term? Clearly **one who limits his activities in the manner indicated** may scarcely be said to be engaged in the law business or to be holding himself out to the public as an attorney at law.

366 Mich 688, 694; 116 NW2d 341, 343 (1962) [emphasis supplied]. AmeriBank's analysis elides the emphasized language about "limitations" entirely. Kupris requires two "limitations": the preparation of documents must be "incidental to the items of business (the preparer) is transacting," and the preparer may make "no extra charge therefor." Kupris at 692.

AmeriBank goes on to argue that since filling in blanks on standard forms may be acceptable when no fee is charged, such a practice cannot become the practice of law simply because a fee is charged. This argument, however, is contrary to both Neller and Kupris; indeed, as the Court of Appeals opinion ably explicates, Neller in particular points out that charging a separate fee for preparing legal documents demonstrates that a nonlawyer crosses the threshold between its business and the legal business when it charges a fee. The fee is the "guiding principle" as to whether "the preparation of the papers involved is the business being carried on or whether this really is ancillary to and an essential part of another business." Neller, at 225, quoting with favor Hulse v. Criger, 363 Mo 26, 247 SW2d 855 (Mo En Banc 1952) [proscribing the practice of charging for filling out legal forms, but not preparing them].

ii. ***The "Document preparation" Fee Disqualifies AmeriBank from Relying upon the "Pro Se" Exception***

AmeriBank seeks to distance itself from the controlling authority of Ingham County Bar Assn v. Walter Neller Co, 342 Mich 214, 69 NW2d 713 (1955) and State Bar of Michigan v. Kupris, 366 Mich 688, 116 NW2d 341 (1962), with the suggestion that it, unlike the Neller and Kupris defendants, is entitled to the benefit of the so-called "*pro se*" exception, which allows interested parties in a transaction to draft documents for their own personal use.

The problem with this analysis is that Neller and Kupris are themselves the Supreme Court authority which recognizes and defines the "*pro se*" exception. Indeed, both Neller and Kupris made the fact that the broker is "interested in the transaction" one of the **twin** criteria for the exception (the second criteria is that there be "no

separate charge"). In Neller, the Court recognized that the broker is interested in the transaction because his commission comes out of the sale:

> "The difficulty is that such contracts must be in writing and duly signed and neither the seller nor the buyer is bound until a contract of sale is signed. Practically speaking **the broker is interested in the transaction up to and including the consummation of the sale.**"

Neller at 229 (emphasis supplied). Because the nonlawyer is interested in the transaction and **does not charge a fee**, he may do what is otherwise prohibited:

> "Such a course by the [broker] **would be improper if a fee were exacted for such services.** This is not an issue in this case. There cannot be any objection to a licensed broker doing such work **(1) without compensation (2) when it is incidental to his business.**"

Id., 229 (emphasis and numbers supplied).

Kupris also is based upon the *pro se* exception: in permitting the Kupris defendant to fill out legal forms the court identified the same two criteria, enjoining him . . .

> . . . from performing legal services for, and from giving advice to, any persons in the State of Michigan, except that the defendant may engage in conveyancing, limited to the filling out of standard printed forms as printed by stationers, when such action is **(1) incidental to the items of business he is transacting, (2) no extra charge being made therefor**...

Kupris at 692 (emphasis and numbers supplied).

In short, AmeriBank is correct that there is a *pro se* exception, but the exception AmeriBank sponsors is inconsistent with the one defined and authorized by this Court. In order to qualify for the *pro se* exception, you have to satisfy **twin** criteria:

(1) You must be interested in the transaction; and

(2) You cannot charge a fee.

AmeriBank, by charging a fee for document preparation, disqualifies itself from the *pro se* exception.

What AmeriBank is arguing for here is a sort of "super *pro se* exception" which recognizes a sliding scale based upon the **level** of interest one has in the transaction: if you are a party, you are so interested that you may not only prepare legal documents, but you may enter the law business by charging a fee for doing so.[5] This argument is contrary to MCL §600.916(1), which flatly forbids nonlawyers from "engag[ing] in the business of law," and is supported by no authority cited by Appellants.[6]

iii. ***"Authorized by Law"***

Finally, AmeriBank argues that because it is authorized by the Savings Bank Act to "engage in the business of banking and exercise all powers incidental to the business of banking," MCL 487.3401(1), (1)(g), it may charge fees for the preparation of loan documents. Once again the problem with AmeriBank's analysis is the fee: the very case (the only case) AmeriBank cites for its position -- Hulse v. Criger, 363 Mo 26; 247 SW2d 855, 862 (Mo 1952) -- is one where the Missouri Supreme Court advanced the analysis adopted by the Neller court: charging a separate fee for preparing the

[5] This argument appears to be footed upon the Circuit Court's pronouncement that the banks assessment of a fee is simply in furtherance of "earning a profit" (see Appellants Brief, p. 5), in this instance, profits derived from preparing legal documents.

[6] The suggestion that the bank and borrower are doing nothing more than shifting the responsibility for "attorney fees" as occurs by contract or by operation of law is fundamentally flawed. First, the fee is being collected for work done by non-attorneys and thus is not an attorney fee. Finally, nothing in the record supports a finding that the parties contracted to shift "attorney fees" to the borrower. Indeed, the HUD-1 signed by both the parties (App 7a) contains a separate line for disclosing "attorney fees" (Line 1107) and it is blank.

documents establishes that the lender has **left** the business of lending and entered the business of law. See Hulse at 45, Neller at 225.

AmeriBank's effort to derive a distinction between brokers and lenders is also futile. Brokers are traditionally compensated by a "percentage," true enough, but so are lenders by an interest rate. Lenders also charge other fees including fees for origination, processing, discount, etc. (See HUD-1, Lines 801, 802, at App 8a). The notion that mortgage lenders must charge a "Document preparation" fee in order to "recoup their costs" (Appellant's Brief at p. 19) not only begs the question before the Court, it is flatly untrue.[7] By its own admission, AmeriBank does more than recoup the cost of generating documents when it charges $400 to fill out legal forms. (Pankratz Dep, p. 62, lines 13-20, App 33b). It is doing it as a business and profiting thereby -- precisely what Neller forbids.

The general language of the Savings Bank Act, authorizing AmeriBank to engage in the business of banking, cannot serve as specific authority to prepare loan documents for a fee. First, the statute bears no family resemblance to legislation that actually **does** authorize charging a fee for preparing legal documents, such as the legislation with which the Union Guardian court was dealing (3 Comp Laws 1929, §12018) and the legislation permitting auto dealers to charge a fee for preparing legal documents (MCL §492.113(2)(1)).[8]

---

[7] Also untrue is the unsupported suggestion that "everyone does it." Most banks do not. Banks including First of America, NBD, National City and Comerica never charged these fees.

[8] Indeed, the nonexistence of legislation like MCL §492.113(2)(1) in the mortgage lending statutes is compelling evidence that the Legislature did not intend lenders to charge a fee for the preparation of legal documents.

Second, the argument proves too much. If general authority to make loans provides authority to do all of the other activities incident to making loans, then AmeriBank employees, in addition to preparing legal documents, may engage in many other activities for which state licensure is required, including performing appraisals and surveys, offering mortgage and title insurance, preparing flood certificates, and even appearing in court to foreclose mortgages.

B. *THE ARGUMENTS TO CHANGE EXISTING LAW*

All current Michigan authority stands for the proposition that a non-lawyer filling in blanks on legal forms - - for a fee - - is engaged in the unauthorized practice of law. The real argument of AmeriBank and the *amici* is that this Court should retroactively **change** existing law to conform to AmeriBank's practice, and that of the several other lenders who have become embroiled in similar litigation.[9]

The rallying cry for this effort to change the law is language taken from State Bar of Michigan v. Cramer, 399 Mich 166, 133; 249 NW2d 1 (1976):

> [A]ny attempt to formulate a lasting, all encompassing definition of "practice of law" is doomed to failure "for the reason that under our system of jurisprudence such practice must necessarily change with the ever-changing business and social order."

There is nothing, however, in the "everchanging business and social order" which provides any reason to permit what is now forbidden. We turn to the various suggestions of AmeriBank and the lending-industry *amici* in this regard.

---

[9] "This is tantamount to saying 'We have been driving through red lights for so many years without a serious mishap that it is now lawful to do so.' The fact that these practices have continued for many years and have been acquiesced in by the bar does not make such activities any less the practice of law." State Bar of Arizona v. Arizona Land Title and Trust Co., 366 P2d 1, 13 (AZ 1961)

i. ***"Filling in Blanks" on "Standard Forms"***

Both Denkema (1939) and Cramer (1976) hold that filling in blanks on standard form documents constitutes the unauthorized practice of law. In Cramer, Justice Levin (concurring with Justice Williams' opinion, which concurred in part and dissented in part with the plurality *per curiam* decision) noted that there is far less risk of harm to the public resulting from the misuse of a "divorce kit" than from misuse of form deeds of conveyance, land contracts, business or residential property leases, *inter vivos* trusts or wills:

> If a complaint for divorce is improperly filed, a judge has an opportunity to notice the defect. . . .When an error is discovered in other legal forms, it is often too late. . .

Cramer at 146. Although AmeriBank takes pains to point out it does not prepare the deed, a mortgage, too, conveys in interest in real estate - - a security interest. The terms selected for inclusion in such a conveyance - - default, notice of default, cure, redemption, etc. - - can spell the difference between whether a Michigan homeowner will keep her home or lose it to foreclosure.[10]

Further, the notion of the "standard FNMA mortgage and note" is substantially overblown by both AmeriBank and the lending industry *amici*. First, there is no record for the conclusion that AmeriBank ever employed FNMA forms (this is one of the many things editorially added to the Pankratz affidavit by AmeriBank's Brief - - compare AmeriBank's Brief at p. 5 to its cited support, Pankratz Affidavit, ¶ 8, App 24a) - - and

[10] Again, the non-uniform covenant in ¶22 of the Dressel Mortgage, App 13a, made it much more likely that the Dressels would lose their home to foreclosure by requiring payment in full of the mortgage amount to cure any default.

the basic FNMA form pressed into service as a starting place in the Dressel loan was customized to include "non-uniform covenants" (App 13a).

Second, even within the limited umbrella of FNMA loans, there are scores of FNMA forms of note and mortgage[11], and for each, scores of ways in which they can be filled out. Note, for example, that the Dressel mortgage, App. 9-13a, includes "non-uniform covenants" (App 13a) which, among other things, limit the Dressels' ability to cure a default without paying off the entire mortgage.

Moreover, many lenders operate outside the rigorous FNMA guidelines for mortgages - - in the so called "sub-prime" mortgage market, where predatory lenders stalk Michigan's less educated consumers every day.[12] Here there is no uniformity in the documents used.

There is absolutely no record for the suggestion that mortgage documentation has become simpler over the years. "[T]itle transactions are becoming increasingly complex as real estate holdings such as condominiums and townhouses become more

---

[11] Many of the FNMA forms may be viewed on FNMA's website. See, e.g.:

- www.efanniemae.com/multifamily/loan_documents/index.jhtml (list of available multifamily forms including 9 forms of note, two forms of guaranty, 50 mortgages, and a list of 19 permissible "modifications")
- www.efanniemae.com/singlefamily/forms_guidelines/mortgage_documents/riders.jhtml (partial list of 48 addenda and riders that may or may not be appropriate given the circumstances)
- www.efanniemae.com/singlefamily/forms_guidelines/mortgage_documents/sec_instr.jhtml (54 single family mortgage forms, each of which can be modified with one or more of the 19 "modifications" and supplemented with one of more of the 48 addenda and riders)
- www.efanniemae.com/singlefamily/forms_guidelines/mortgage_documents/specpurpdocs.jhtml (special purpose mortgage documents covering various recurring situations and scenarios)

[12] For a list of the legislation proposed to curb predatory lending in Michigan and other states in 2001 alone, see www.ncsl.org/programs/banking/PredLend_pend_01/html

popular." Cardinal v. Merrill Lynch Realty/Burnet, Inc., 433 NW2d 864, 870 (Minn 1988) [dissenting opinion].

Moreover, there is no wisdom in trying to derive a distinction between what is, and what is not, the practice of law based upon the complexity of the legal instrument:

> It might have been presumed with propriety that such an argument as a test for the determination of the question of illegal practice was laid at rest when Judge Pound said, in People v. Title Guarantee and Trust Co., 227 NY 366, 379 (NY 1919):
>
> "I am unable to rest any satisfactory test on the distinction between simple and complex instruments. The most complex are simple to the skilled and the simplest often trouble the inexperienced."

People v. Lawyers Title Corp., 282 NY 513, 521; 27 NE2d 30, 33-34 (NY 1940). Both the selection of the appropriate forms (even from among the large universe of FNMA forms) and filling them out require the exercise of legal judgment:

> [An employee] in "filling in a form," obviously exercises his own discretion as to what form should be used, and what language is to be inserted in the blank spaces. By virtue of his training and professional role, the lawyer is able to question his client freely, advise him of the legal effect of various forms of conveyance or other instruments, and then use such legal documents and language as will best effect the objectives of the client.

State Bar of Arizona v. Arizona Land Title & Trust Co., 366 P2d 1, 10 (AZ 1961).

> [P]reparation of instruments, even with preprinted forms, involves more than mere scrivener's duties. By necessity, the agents pass upon the legal sufficiency of the instruments to accomplish the contractual agreement of the parties.

State of South Carolina v. Buyers Service Co., 357 SE2d 15, 17 (SC 1987).

ii. ***The Attempt to Derive a Distinction Between Brokers and Lenders***

It is argued that the Court should enforce a distinction between "brokers," who are merely "interested in the transaction" and "lenders," who are parties. The notion that Neller and Kupris intended to address the former circumstance and not the latter is unsupported by the text of either decision - - this is pointed out above - - but another point must be made as well: Neller and Kupris both rely upon the fact that the mortgage brokers who are permitted to prepare legal documents (without charging a fee only) are specially trained and licensed. This stands in marked contrast to the case at bar, where the documents are prepared by clerical staff, unlicensed and uneducated in the preparation of legal documents.

In short, the distinction to be derived between licensed brokers preparing legal documents in transactions in which they are "interested," without charging a fee, and untrained and unlicensed clerks preparing documents for a fee, in the circumstances where their employer is a "party," does not support allowing the latter to charge a fee.

iii. ***"Everybody's Doing It"***

While the suggestion that this Court should craft the law to accommodate the practices of the mortgage lobby is troubling on its face, the suggestion of AmeriBank and several of the amici that the practice of charging fees for the preparation of legal documents in Michigan is universal (or even widespread) is unsupported and untrue. Of the hundreds of mortgage lenders licensed by the Michigan Office of Financial and Insurance Services (formally the Financial Institutions Bureau), only the handful that have been sued charged illegal document preparation fees. Even those institutions

discontinued doing so when undersigned counsel filed this and several other cases against lenders who charged the fee, back in 1997-1998. Today, virtually no mortgage lender charges the fee.[13] This has not hurt the industry: mortgage lending is in one of its largest booms ever.

Nor can the suggestion that federal mortgage regulations authorize document preparation fees - - or preempt their exclusion - - be countenanced. AmeriBank and at least two of the lending industry amici (Huntington National Bank and Rock Financial) suggest that the federal Truth in Lending Act permits fees for preparation of loan documents. This argument is left undeveloped because it is untrue: The Truth in Lending Act deals only with the manner in which the cost of lending is disclosed (see 15 U.S.C. §1601(a)) and specifically provides that it has no effect upon the laws of any state regarding what charges may be assessed. 15 U.S.C. §1610(b).[14]

The bottom line is that neither AmeriBank nor any of the industry amici is able to point to a single change in the times that suggests the definition of the practice of law should be liberalized. Mortgage lending is today more, not less complex. "Predatory lending," a term unheard of twenty years ago, is now rampant.

---

[13] The Dressels recognize that this averment is no more supported by the record than their opponents' contrary averment, but we are more than able to establish its truth from deposition testimony in other cases should the Court wish to expand the record.

[14] Note that the correct cite for the Truth in Lending Act is 15 U.S.C. §1601, not 12 U.S.C. §2601 as suggested in the Huntington/Rock Financial amicus brief (p. 14, n. 12). The latter cite is to the Real Estate Settlement Procedures Act, which also specifically provides that it does not affect substantive state law. 12 U.S.C. §2616.

C. *THE LAW OF OTHER STATES*

The Court of Appeals correctly notes in its opinion that a majority of the states considering the question have concluded that "charging a fee can take an otherwise incidental act into the realm of the unauthorized practice of law." Dressel, slip op at 5, App 45a.

AmeriBank in its brief presents an analysis of two states - - Indiana and Minnesota - - but that analysis is wrong. Contrary to the assertion in p. 10-11 of AmeriBank's brief, the Indiana case of Miller v. Vance, 463 NE2d 250 (Ind 1984) reached exactly the same conclusion as the Court of Appeals did here:

> We emphasize that there are certain limitations which apply to bank employees similar to those placed upon real estate brokers. A lay bank employee may fill in the blanks on a standardized mortgage form which has been approved by an attorney in a transaction which involves the employer bank and the bank's client. The lay bank employee may not give advice or opinions as to the legal effects of the instruments he prepares or the legal rights of the parties. **The bank may not make any separate charge for the preparation of the mortgage instrument**. *See State v. Indiana Real Estate Association, Inc.*, 244 Ind. 214 (Ind 1963); 224-225, 191 NE2d 711, 716-717.

Miller v. Vance, supra at 253.

The Minnesota case AmeriBank relies upon is misdescribed as well. Cardinal v. Merrill Lynch Realty/Burnet Inc., 433 NW2d 864 (Minn 1988) dealt with a scenario different from the one at bar - - the Minnesota statute at issue, Minn Stat §481.02, specifically permitted real estate brokers to draft real estate transfer documents "with or without charge." Cardinal at 867. In ruling that a broker could charge a fee for filling in blanks on form real estate documents, the Minnesota court did no more than follow the

law provided it by the legislature. In Michigan, however, the legislation is quite different.[15]

While there is no surprise that the laws of over 50 states exhibit some divergence on the unauthorized practice of law issue (for example, Kentucky forbids the charge but also provides the additional safeguard of attorney review - - Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Association, 540 SW2d 14 (KY 1976)), among those states that permit nonlawyers to draft legal documents under any circumstance, a compelling majority follow the rule of Ingham County Bar Association v. Walter Neller Co. and State Bar Association v. Kupris. These states are identified below:

Arkansas:	Pope County Bar Ass'n v. Suggs, 624 SW2d 828 (Ark 1981)
Colorado:	Conway-Bogue Realty Investment Co. v. Denver Bar Association, 312 P2d 998, 1009 (Colo 1957) [Realtors may prepare documents "provided no charge is made therefor"]
Florida:	Preferred Title Services v. Seven Seas Resort Condominium, Inc., 458 So2d 884 (Fla 1984)
Georgia:	Georgia Bar Ass'n v. Lawyer's Title Insurance Corp., 151 SE2d 718 (Ga 1966)
Illinois:	First Federal S & L Ass'n v. Sadnick, 515 NE2d 1354 (Ill App 1987) [but see, Michalowski v. Flagstar Bank, FSB, 2002 US Dist LEXIS 1245 (ND Ill 2002), which departs from this state law authority]
Indiana:	Miller v. Vance, 463 NE2d 250 (Ind 1984).

[15] As shall be developed in more detail in the policy section of this Brief, infra, the Michigan statutes not only do not contain the exception found in the Minnesota statute, they provide direct support for the conclusion that charging a fee can transform an otherwise incidental act into the practice of law. MCL §600.916(1) provides among other things that a "person shall not. . . engage in the law business. . ." Moreover, MCL §450.681, forbidding the practice of law by corporations, permits corporations to allow their own counsel to represent the corporation's employees only when it is done "without charge."

Kentucky:	Federal Intermediate Credit Bank of Louisville v. Kentucky Bar Association, 540 SW2d 14 (Ky 1976) [cannot charge a fee and attorney must review]; Kentucky State Bar Ass'n v. Tussey, 476 SW2d 177 (KY 1972).
Massachusetts:	In re Opinion of Justices, 289 Mass 607 (Mass 1934) ["The occasional drafting of simple deeds or other legal instruments when not conducted as an occupation or yielding substantial income may fall outside the practice of law"] [but see, Massachusetts Association of Bank Counsel, Inc. v. Closings, Ltd., 1993 Mass Super LEXIS 239 (Mass Super 1993), holding that drafting mortgages is the unauthorized practice of law regardless of fee].
Missouri:	Bray v. Brooks, 41 SW3rd 7 (Mo App 2001); In Re First Escrow, Inc., 840 SW2d 839 (1992); Hulse v. Criger, 247 SW2d 855 (Mo En Banc 1952).
Montana:	Pulse v. North Am. Land Title Co. of Montana, 707 P2d 1105 (Mont 1985)
New Mexico:	State Bar of New Mexico v. Guardian Abstract & Title Co., 575 P2d 943, 949 (NM 1978) ["the making of separate additional charges to fill in the blanks would be considered the "practice of law. . ."]
New York:	Duncan & Hill Realty, Inc. v. Department of State, 62 AD2d 690, 696 (NY App Div 1978)
North Carolina:	State v. Bryan, 98 NC 644, 647 (NC 1887) ["compensation for his services. . .is an essential element in the *practice* of law"]
North Dakota:	Cain v. Merchant's National Bank and Trust Co., 268 NW 719, 723 (ND 1936) ["a person who is not a member of the bar may draw instruments such as simple deeds, mortgages, promissory notes and bills of sale when these instruments are incident to transactions in which such person is interested, provided no charge is made therefor"]
Pennsylvania:	Childs v. Smeltzer, 315 Pa 9 (Pa 1934)

Apart from the number of states that do not appear to have addressed the issue of preparing legal documents from forms, the next most frequent rule is substantially

more restrictive, holding that legal documents must always be prepared by a lawyer or that a lawyer must attend a real estate or mortgage closing. States falling into this category include Delaware (In the matter of: Mid-Atlantic Settlement Services, Inc., 755 A2d 389 (Del 2000)); Nevada (Pioneer Title Ins. Trust Co. v. State Bar of Nevada, 326 P2d 408 (Nev 1958)); Alabama (Coffee County Abstract and Title Co. v. State of Alabama, 445 So2d 852 (Ala 1983)); South Carolina (State v. Buyers Service Co., 357 SE2d 15 (SC 1987)); Oklahoma (RJ Edwards, Inc. v. Hert, 504 P2d 407 (OK 1972)); and Ohio (Gustafson v. Jestrab, 1940 Ohio Misc LEXIS 435 (Oh 1940); Mintz v. Hritz-Miskolczy, Inc., 1940 Ohio Misc LEXIS 436 (Oh 1940)).

Outside of these three groups (states that prohibit fees; states that have not considered the issue; and states even more restrictive) it is difficult to generalize about the balance of state opinions. Even the state that most nearly tracks the rule of law AmeriBank and most of the industry *amici* prefer, Washington, does not announce a rule that is on all fours with what these groups are asking for here. While the Washington case of Perkins v. CTX Mortg Co., 969 P2d 93 (Wash 1999) does state that the assessment of a fee is not conclusive as to whether a party filling in blanks is engages in the unauthorized practice of law, it rejects flatly AmeriBank's central tenet that it can both fill out documents solely for itself and charge a fee to another for the same documents:

> The receipt of compensation is conclusive evidence that the layperson is not merely acting for himself but has assumed the additional responsibility of acting for another.

Perkins at 96. Here, the affidavit of AmeriBank's own president, Lee Pankratz, establishes that AmeriBank "prepares these documents to protect its own interest...and not as a service to borrowers." App 25a. Moreover, the Perkins court relied upon a fact record - - not present here - - showing intimate attorney involvement in the document preparation process. Perkins at 96-97. Washington courts have declined to apply Perkins to cases that do not have a fact record showing attorney involvement in the document preparation process. Kim v. Desert Document Services Inc., 2000 Wash App LEXIS 1216 (2000).

In sum, the rule announced in Neller and Kupris, and furthered by the Court of Appeals here, is by far the most common among our states, and AmeriBank and the *amici* are hard pressed to find a single state with parallel legislation whose courts articulate the position the lenders would have this Court adopt.

D. PUBLIC POLICY

i. Consumer Confusion and Divided Loyalties

The public interest is at the heart of the unauthorized practice of law statutes and the prior opinions of this Court. This interest is well-served by a rule that forbids fees by non-lawyers for the preparation of legal documents.

The case at bar is a prime illustration: AmeriBank charged Michigan consumers $400 for the preparation of legal documents where its own costs for doing so were, by AmeriBank's own admission, far less. Pankratz dep, p. 62, App 33b. Yet Pankratz in his affidavit candidly admits that the legal documents are prepared to serve the Bank's interest alone, and not the consumers.

Concern about the undivided loyalty of those who provide legal services for a fee is a theme that arises again and again in the case law of our sister states, and, indeed, finds voice in the Michigan statute prohibiting corporations from practicing law.[16] MCL §450.681 provides that when an in-house attorney provides services "to any employees of such corporation" that such services must be "without charge." The obvious reason for this is that paying a charge would signal to the employee that the attorney is providing her unswerving allegiance to the employee, when the attorney must in fact maintain her allegiance to the real principal, the company.

> What is involved is not simply the license to practice, but the professional duty of loyalty that is included in the concept of permissible representation.

In Re Opinion No. 26 of the Committee on the Unauthorized Practice of Law, 654 A2d 1344 (NJ 1995). AmeriBank's actions are absolutely antithetical to this precept: it wants to do what lawyers do (prepare legal documents) because it is a party, **and** charge a fee, but abandon the duty flowing from its actions because it is just a bank serving its own interests. This notion was scorned by a New York superior court judge in a case involving a real estate buy/sell agreement prepared by a realtor:

> However, one may not justify a practice on the basis of being a principal and then argue freedom from a particular obligation under the same contract because one is only an agent. Despite Mr. Bumble, the law is not all that of an ass. It is a

[16] AmeriBank cites more than once Circuit Judge Paul Sullivan's opinion, Krause v FMB, Kent County Circuit Ct. No. 98-00750-CP, suggesting that no reasonable person could conclude that the documents for which they were paying were being prepared for their benefit and protection. The record in that case, however, establishes that Judge Sullivan is wrong: the Bank in that case admitted through multiple officers, including its compliance officer, that a consumer is entitled to expect that a service for which they are charged is performed for their benefit. See testimony of Michele Crane, P. 68, lines 5-8, App 124b, and Barbara Stricker, p. 62, line 14 to p. 63, line 20, App 129b.

> sword that cuts both ways. It may not be manipulated to serve as a weapon for one purpose and a shield for another.

Wyckoff v. O'Neil, 64 Misc 2d 333, 340 (NY Sup Ct 1970).

With regard to this issue, it is even more important to enforce the rule of Neller and Kupris against the mortgage lenders than it is the realtors. As the Hulse v. Criger court pointed out, in the case of realtors preparing form legal documents, the broker has sufficient identity with the seller he represented to safeguard the interests of the seller. Hulse at 861. In the case at bar, the lender is protecting its own interest to the exclusion of the borrower's by its own admission, collecting a fee for doing so.

ii. Protection of Consumer Interests

The rule announced in Neller and Kupris enhances the protection of consumers because consumers will not be misled into thinking they are paying $400 for a set of legal documents that is serving their interest. As such, consumers will be encouraged to carefully parse the legal documents, or better yet, although they need not, obtain attorney review of them.[17]

Such a review would (notwithstanding AmeriBank's mantra of "standard form documents") reveal changes that could be made to protect individual consumers. In this case, the Dressel's mortgage itself contains a prime example: the "Nonuniform Covenants" on page 5 (App 13a) include, in Paragraph 21, language that provides, if the Dressels default on their loan, and are unable to cure their default in 30 days, they will

[17] Many a solo practitioner would find it profitable to provide mortgage borrowers with this service for less than $400. Moreover, involvement of counsel might curb the predatory and deceptive practices. See Hearings on Problems in Community Development Banking, Mortgage Lending Discrimination, Reverse Redlining, and Home Equity Lending, Before the Senate Comm. on Banking, Housing and Urban Affairs, 103d Cong., 1st Ses. (Feb. 3, 17, 24, 1993).

be unable to stop foreclosure unless they pay off the underlying loan **in full**, including costs and attorney fees. This provision is **not** required by the FNMA, and if AmeriBank were unwilling to remove it, a borrower would be well advised to take her business elsewhere.

Further, the Neller and Kupris rule, by circumscribing the ability to assess a fee on Line 1105 of the HUD-1, eliminates at least one of the several places where mortgage lenders deceptively squirrel away "junk fees," various fees that masquerade as fees for services provided, but are really no more than extra profit for lenders. **This is exactly what AmeriBank was doing here**: it admits that its costs in preparing legal documents is far less than the $400 it charged for the service.[18]

iii. The Slippery Slope

Finally, AmeriBank offers no principled basis for distinguishing mortgage lenders from the numerous other industries that would like to charge fees for the preparation of legal documents, as demonstrated by the *amicus* briefs of the Michigan Land Title Association and the Michigan Realtors' Association. Abandoning the holdings of Neller and Kupris will confront this Court with a "Hobson's choice" of either opening the floodgates to allow **any** party to a transaction to charge fees for preparing legal documents, or attempting to articulate some rationale by which the mortgage lending industry may be distinguished from others. No principled rationale

[18] Defendant's contention that the fee was really assessed to cover a larger universe of activity (origination costs) and not for "Document preparation" as defined by RESPA (See footnote 2, *infra*) is unprincipled. Endorsing Defendant's argument that words have no meaning, or a secret meaning that is divorced from that understood by the rest of the world (deconstructionism), is to abandon from the outset the search for truth.

for doing so exists and none has been advanced by Appellant. Indeed, the amicus briefs from industries other than the mortgage lending industry make the point that for starters title companies and realtors at least are no different than banks.

E. *LEGISLATIVE INTENT*

This Court recently wrote:

> The paramount rule of statutory interpretation is that we are to effect the intent of the Legislature. *Tryc v. Mich. Veterans' Facility*, 451 Mich 129, 135; 545 NW2d 642 (1996). To do so, we begin with the statute's language. If the statute's language is clear and unambiguous, we assume that the Legislature intended its plain meaning, and we enforce the statute as written. *People v. Stone*, 463 Mich 558, 562; 621 NW2d 702 (2001). In reviewing the statute's language, every word should be given meaning, and we should avoid a **construction** that would render any part of the **statute** surplu sage or nugatory. *Altman v. Meridian Twp*, 439 Mich 623, 635; 487 NW2d 155 (1992).

Omelenchuk v. City of Warren, 2002 Mich LEXIS 1227 (July 9, 2002) (emphasis added). As developed infra, the legislation involved here, MCL §600.916(1) prohibits laypersons from "engag[ing] in the law business," and MCL §450.681 (forbidding the practice of law by lay corporations) forbids even corporate attorneys to charge fees when representing the corporation's employees. These are strong indicators that the legislature intended to adopt the majority rule where charging a fee describes the threshold between representing **yourself** and representing **another** in an unauthorized fashion.

That the legislature did not intend to provide general permission to lay individuals or corporations to derive revenue from the preparation of legal documents is further confirmed by the legislation addressing those circumstances where a fee **may**

be charged: when the legislature intends to permit a nonlawyer to assess a fee for the preparation of legal documents, it says so. For example, when the legislature determined to permit automobile dealers to charge a fee for preparing legal documents transferring automobile title, it enacted MCL §492.113(2)(1), specifically authorizing "documentary preparation fees," and providing that those "documentary preparation fees shall not exceed $40." Id. Likewise, in 1929, when the legislature authorized trust companies to charge a fee to prepare intervivos trusts, it enacted the statute upon which the Union Guardian court relied, 3 Comp Laws 1929, §12018 (1929), permitting them to assess "such remuneration as may be agreed on."

The absence of any legislation authorizing mortgage lenders to charge a fee for preparing legal documents, together with the text of the two statutes prohibiting the practice of law, establish that the legislature did not intend to allow lenders to charge fees to prepare legal documents and in fact prohibited it.

II. CONSUMER PROTECTION ACT EXEMPTION

A. AMERIBANK "CROSSED THE THRESHOLD" OUT OF LENDING

Because AmeriBank did not claim it was entitled to exemption from the Consumer Protection Act, MCL §445.901 *et seq*, until it raised the issue in barely more than a page in its response to the Dressel's brief to the Court of Appeals, the Court of Appeals did not have the benefit of much guidance when it addressed the issue in its opinion.[19]

[19] While the Dressels remain concerned that the preemption issue is not properly before this Court, they assume the Court decided this issue against them when it granted leave to appeal.

Perhaps as a result, the Court of Appeals' analysis of this issue is unnecessarily prolix. The fact is, the Court of Appeals established that AmeriBank is not entitled to exemption from the Michigan Consumer Protection Act when it held that AmeriBank's "separate fee for the preparation of mortgage documents. . .**crosses the threshold** of providing services for the bank's own benefit and engaging in a business where a profit is made from manufacturing legal documents. . ." Dressel, slip op at 5, App 45a. Since the lender's authority to act as a lender does not permit it to engage in the practice of law, that authority cannot serve as the basis for a Consumer Protection Act exemption. Indeed, this was the precise holding in Attorney General v. Diamond Mortgage, 414 Mich 603; 327 NW2d 805 (1982), a case cited by, specifically reaffirmed by and extensively quoted in the very case AmeriBank relies upon, Globe Life:

> In Diamond Mortgage, the defendant, a real estate broker, also advertised and offered loans to homeowners . . . . . The defendant in Diamond Mortgage argued that it was exempt from the MCPA under Section 4(1) because it had a real estate brokers' license and that one of the activities contemplated was that a licensee would negotiate the mortgage of real estate . . . .
>
> * * *
>
> "While the license generally authorizes Diamond to engage in the activities of a real estate broker, it does not specifically authorize the conduct that plaintiff alleges is violative of the Michigan Consumer Protection Act . . .For this case, we need only decide that a real estate broker's license is not specific authority for all the conduct and transactions of the licensee's business."

Globe Life at 464, quoting Diamond Mortgage at 617. Although it did not cite Diamond Mortgage, the Dressel opinion's acknowledgement that the activity "crosses the

threshold" into the practice of law leads inexorably to the conclusion that the Consumer Protection Act applies: .

> The trial court's opinion reasoned that, because the remainder of plaintiffs' claims were erroneously premised on the theory that either defendant had engaged in the unauthorized practice of law or had illegally charged plaintiffs a fee, plaintiffs could not prevail on any of their theories of relief. Plaintiffs now argue that, because the trial court's underlying assumptions on the unauthorized practice of law and fee issues were erroneous, the trial court erred in dismissing their MCPA claims. We agree.

Dressel, slip op at 6, App 46a. Put simply, the Court of Appeals correctly held that when AmeriBank was preparing legal documents for a fee, it was engaged not in mortgage lending, but in the practice of law. Just as the realtor in Diamond Mortgage could not rely on his realtors license when he made loans, AmeriBank cannot rely upon its status as a lender when it practices law.

B. *THE MCPA APPLIES TO MORTGAGE LENDING*

Moreover, and apart from the above analysis, Globe Life should not be read broadly to apply to all regulated businesses - - a point the Globe majority opinion itself made:

> [C]ontrary to the position of the concurrence, insurance companies are not "like most businesses."

Globe Life at 466, n. 12.

Because virtually every industry is subject to regulation, such a broad reading would effectively repeal the Consumer Protection Act, a result that is flatly inconsistent not only with the Globe Life opinion (which the Court took care to limit to its facts) but with Attorney General v. Diamond Mortgage Co., 414 Mich 603 (1982); a case Globe Life

specifically upheld, and with Kekel v. Allstate Ins. Co., 144 Mich App 379; 375 NW2d 455 (1985), also upheld in pertinent part by Globe.

i. The Legislature Intended the MCPA to Apply to Credit Transactions.

All aspects of consumer credit have long been regulated. Retail installment credit, including credit card loans, are subject to the Retail Installment Sales Act, MCL §445.851, *et seq.* (enacted in 1966). Auto loans are subject to MCL §492.101, *et seq.* (enacted in 1950). Home improvement loans are subject to MCL §445.1101 *et seq.* (enacted in 1965).[20]

Against this plethora of regulatory schemes applicable specifically to providers of credit, the Legislature in 1976 specifically outlawed "causing a probability of confusion or of misunderstanding as to the terms or conditions of credit." MCL §445.903(o). If, as AmerBank argues, providers of credit are exempt from the MCPA because credit is regulated, then subsection (o) of the MCPA is without meaning and has been since its enactment.

The courts, of course, have enforced subsection (o), and they have done so against banks, specifically in the context of mortgage lending. See Dukes v. Salem Mortgage Co. (In re Dukes), 24 BR 404 (Bktcy ED Mich 1982). Mortgage lending practices were also successfully challenged under the MCPA in Attorney General v. Diamond Mortgage, 414 Mich 603 (1982).

Construing subsection (o) of the MCPA to apply to an empty set of transactions belies fundamental rules of statutory construction. All words of a statute should be given

[20] The only consumer loan made in the State of Michigan since the 1960's where the creditor is not subject to licensing and regulation is a loan between friends or family, and such a loan is outside the Consumer Protection Act because it is not one in "trade or commerce" within the meaning of MCL 445.902(d) and 903(1).

meaning and no word treated as surplusage. People v. Babcock, 343 Mich 671; 73 NW2d 521 (1956); State Bar v. Galloway, 422 Mich. 188 (1985). Courts will not conclude that any section of an act serves no useful purpose if it can be interpreted in a manner that avoids such consequence. Haas v. Ionia, 214 Mich App 361 (1995) *app den*; 454 Mich 880.

Moreover, the Legislature clearly envisioned that the Consumer Protection Act would apply to banks and other lenders when it enacted, as part of the Act, Section 17 (MCL §445.917), which permits the commissioner of the Financial Institutions Bureau concurrent jurisdiction to wield a portion of the power of the attorney general against "a state or federally chartered bank" with regard to "a method, act or practice which is unlawful under this act." If the Act does not apply to banks, this language is nonsense.

Obviously, in enacting the Consumer Protection Act, the Legislature meant to reach credit transactions, even in the face of existing regulation. MCL §445.904(1) cannot be construed to render this Section of the Act nugatory.

ii. The Transaction of Which Plaintiffs Complain Is Not "Specifically Authorized"

The Court will find a cogent summary of AmeriBank's position in Judge Cavanaugh's dissenting/concurring opinion in Globe:

> Under the majority view, any activity that is **regulated** by a regulatory board or officer acting under statutory authority of this state or the United States, is specifically authorized. . . . I suggest the majority cannot provide meaningful examples where a consumer would not be blocked by subsection 4(1)(a) under its reading of the terms "specifically authorized."

Dissenting Opinion, pp. 7-8. The Globe majority, however, specifically rejected this reading of its opinion.

> [C]ontrary to the position of the concurrence, insurance companies are not "[l]ike most businesses."

Globe Life at 466, fn. 12.

If the insurance industry is unlike most industries, it is decidedly unlike the banking industry. As Judge Cavanaugh points out in Globe, all businesses are regulated. A trip to the grocery store to buy household supplies will yield transactions regulated by the USDA (sale of meat), the FDA (food and pharmaceuticals), the ATF and LCC (wine). Further regulation comes from the Department of Labor, MIOSHA, the IRS, the Health Department, *ad infinitum*. The majority in Globe rejects the notion that the MCPA applies only to business operating outside state or federal regulation.

C. *THE SAVINGS BANK ACT*

The Dressels submit that, had the Consumer Protection Act exemption been properly before it, and the parties meaningfully briefed it, the Court of Appeals would have adopted the foregoing analysis, establishing that the business of law is distinct from the business of banking, and never reached its analysis under the Savings Bank Act.[21]

i. Retroactive Application

Although AmeriBank argues that the Court of Appeals' decision is wrong because the revisions to MCL §445.904 cannot be applied retroactively, AmeriBank concedes that new or amended statutes are applied retroactively when the statute is

[21] AmeriBank seeks to resolve the substantial confusion it has created about whether it was a State Savings Bank or a federal bank in the appropriate time frame by introducing in its appendix documents never part of the record below. Neither the document at App 1a not that at 48a is part of the record, and AmeriBank's effort to supplement the record now is not authorized.

remedial in nature. AmeriBank Brief, p. 28, fn 7, citing People v. Russo, 439 Mich 584, 594; 487 NW2d 698 (1992). "The MCPA is a remedial statute designed to prohibit unfair practices in trade or commerce and must be liberally construed to achieve its intended goals." Forton v. Laszar, 239 Mich App 711, 715; 609 NW2d 850 (2000). AmeriBank seeks to avoid this result by characterizing the prior Section 4(2) as a "defense" upon which it was entitled to rely. The cases it cites, however, in support of its argument, do not credit such a distinction, and in fact refute it. For example, in People v. Russo, *supra*, a modification to the statute of limitations was provided retroactive effect. In Hansen-Snyder v. General Motors, 371 Mich 480; 124 NW2d 286 (1963) this Court applied retroactively changes to a mechanics' lien law that would have barred a claim but for the changes. This case falls squarely into the cases AmeriBank cites, but those cases compel a result the opposite of what AmeriBank seeks.

ii. The Credit Reform Act Analysis

If there is a problem with the Court of Appeals' analysis of the Savings Bank Act and its interrelationship with the Credit Reform Act, MCL 445.1851 et seq., it is that it is overly restrictive. Certainly MCL 487.3430(a) limits lenders to those fees authorized by the Credit Reform Act. Subsection (d) however, provides that in the event the Credit Reform Act does not apply, the savings bank is limited to those fees "otherwise permitted by law."[MCL 487.3430(d)] Because fees for the preparation of legal documents are not lawful when assessed by a nonlawyer, they are forbidden by Subsection (d).

If such fees were permitted by the Credit Reform Act, perhaps AmeriBank could rely on MCL 487.3430(a), but they are not. AmeriBank's argument to the contrary is unprincipled: according to AmeriBank, the only fee that may be defined as "excessive" under MCL 445.1857(3) is one to which a borrower has not "agreed to" under MCL 445.1857(1). This analysis does not survive a reading of the cited subsections. Subsection (3) is a limitation on subsection (1): fees may be as agreed, provided they are not excessive. Otherwise subsection (3) is meaningless. Again, such a result is inconsistent with sound statutory construction. State Bar v. Galloway, *supra.*

iii. AmeriBank's New Analysis, If Credited, Guts its Exemption Argument

One final observation: even if the Court were to endorse AmeriBank's analysis of the Savings Bank Act, the ineluctable result would be the rejection of AmeriBank's "exemption" argument. AmeriBank's argument that the Consumer Protection Act does not apply to it is predicated upon the notion that AmeriBank was **regulated** by the Financial Institutions Bureau. AmeriBank now argues that mortgage loans are *exempt* from the Credit Reform Act by virtue of the fact that they are *deregulated* loans subject to the Depositary Institutions Deregulation and Monetary Control Act ("DIDMCA"), 12 USC 1735f-7. If AmeriBank is successful in arguing that mortgage loans are immune from state lending regulations by virtue of DIDMCA, the entire exemption argument AmeriBank advances under MCL 445.904(1) founders, because the "regulation" it relies upon for exemption no longer applies.

CONCLUSION

The unauthorized practice of law issue at the heart of this dispute is one this Court has already resolved in Neller, a holding revisited and upheld in Kupris. The rule of *stare decisis* applies.

With regard to the Consumer Protection Act exclusion issue, if the Court of Appeals made any error, it was in entertaining an exemption argument that was not properly pleaded or otherwise raised at the trial level. The Court of Appeals' analysis ably demonstrates that accepting a fee for the preparation of legal documents is not part of the business of lending, it is part of the business of law, and as such, it may not be immune from the Consumer Protection Act even under the liberal reading of Globe Life advanced by AmeriBank.

Respectfully submitted,

DREW, COOPER & ANDING

Dated: July 19, 2002

By: _____

John E. Anding (P30356)
Christopher G. Hastings (P40861)
Bridget C. Kehoe (P28196)
Business Address:
125 Ottawa Avenue, N.W.
Suite 300, Ledyard Building
Grand Rapids, Michigan 49503
Telephone: 616/454-8300

I:\lmg\1962-01SupCrtBrief.doc